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Joshua W. Gardner†

"The guards used to tell me, 'You'll be here until you're dead.'"
-Nestor Campbos of Cuba, recounting how guards at Orleans Parish Prison in Louisiana described his detention.[1]

Introduction

Kestutis Zadvydas was born in 1948 to parents of Lithuanian ancestry in a displaced-person camp in Germany.[2] He and his family immigrated to the United States when he was eight years old.[3] Though Zadvydas has since married, had a daughter,[4] and lived a full life in America, he has never

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1. Human Rights Watch interview with Nestor Campos, New Orleans, Louisiana (Mar. 23, 1997) (cited in *Locked Away: Immigration Detainees in Jails in the United States*, 10 Human Rights Watch 1 (G) (Sept. 1998), *available at* http://www.hrw.org/reports98/us-immig/Ins989-05.htm.

2. *See* Zadvydas v. Davis, 533 U.S. 678, 684 (2001).

3. *See id.*

4. *See* Brief for Respondents at 5, Zadvydas v. Davis, 533 U.S. 678 (2001) (No. 99-7791).

acquired U.S. citizenship.[5] Zadvydas has an extensive criminal history, culminating in a 1987 conviction for possessing cocaine with the intent to distribute.[6] He was sentenced to sixteen years imprisonment, with six years of the sentence suspended.[7] After serving two years of his sentence, Zadvydas earned parole.[8] Had Zadvydas been a U.S. citizen, his detention would likely have ended then. Instead, the Immigration and Naturalization Services (INS) took Zadvydas into custody and began deportation proceedings.[9] In 1994 an immigration judge ordered Zadvydas deported to Germany because he was an alien convicted of two crimes of moral turpitude.[10] Both Germany and Lithuania refused to take Zadvydas because he met neither of the countries' citizenship requirements, so the INS kept Zadvydas in jail.[11] In 1996 the INS tried to deport Zadvydas to the Dominican Republic, his wife's home country.[12] These negotiations failed, and the INS kept Zadvydas in jail.[13] For all practical purposes the INS felt justified in keeping Zadvydas detained indefinitely.[14]

Until the Supreme Court ruled on Zadvydas' detention in June of 2001 nearly 3,000 aliens whose crimes ranged from serious felonies to overstaying a tourist visa languished in U.S. prisons with little hope of release, based on the sheer accident that that no other country would take them.[15] The INS based these detentions on the statutory authority of Immigration and Nationality Act § 241(a)(6) which provides:

> [a]n alien ordered removed who is inadmissible . . . removable [as a result of violations of status requirements or entry conditions, criminal convictions, or matters of foreign policy], or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period."[16]

The government argued that this statute granted the Attorney General the power to continually detain an alien, perhaps indefinitely, and that the statute comported with substantive and procedural due process because the courts owe Congress and the Executive "substantial deference under the plenary power doctrine," and because periodic administrative review of the administrative decision to keep an alien jailed could properly evaluate the alien's threat to the community or flight risk.[17]

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5. *See* Zadvydas v. Underdown, 185 F.3d 279, 283 (5th Cir. 1999).
6. *Id.*
7. *See id.*
8. *Id.*
9. INS brought the deportation proceedings pursuant to 8 U.S.C. § 1251(a)(2) (1998 ed., Supp. V); Zadvydas v. Davis, 533 U.S. at 684-85.
10. *See* Zadvydas v. Davis, 533 U.S. at 684.
11. *Id.*
12. *Id.*
13. *Id.* at 684-85.
14. *See* Oral Arguments, Zadvydas v. Underdown, Feb. 12, 2001, 2000 U.S. Trans. LEXIS 12, at *39.
15. *See Convicted Immigrants' Detention Limited*, WORLD NEWS DIGEST, June 28, 2001.
16. 8 U.S.C. § 1231(a)(6).
17. Brief for Respondents at 17-20, Zadvydas v. Davis, 533 U.S. 678 (2001) (No. 99-7791).

When taken as part of the recent legislative trend insulating administrative immigration decisions from judicial review,[18] the government's interpretation seemed particularly excessive.[19] The government read this vague statute as giving the Attorney General wide discretion to hold an alien potentially for life.[20] The government further asserted that the Attorney General's decisions were largely immune from judicial review.[21] In addition, the government argued that under the plenary power doctrine, the courts should grant "substantial deference" to immigration decisions the government makes under Congressional authority.[22]

In June 2001, the Supreme Court responded to these events with the *Zadvydas v. Davis* opinion.[23] In a 5-4 decision, the Court cited serious constitutional concerns with an interpretation of the statute that would allow indefinite detention.[24] However, rather than invalidate the statute, the majority took a middle ground, reading a limit into the statute whereby an alien's post-removal-period detention is only allowed for a period reasonably necessary to bring about removal.[25] The Court held that detention past six months is presumptively invalid.[26]

Although *Zadvydas* was something of a compromise, the ruling still bolsters due process protection for some immigrants and signals a

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18. *See, e.g.*, Immigration & Nationality Act (INA) §§ 106(a)(10), 242(a)(2)(B)-(C). Courts understandably disfavor provisions that infringe on their power of review. Though courts have generally refrained from striking down these court-stripping statutes, they often limit their application. *See* Kolster v. INS, 101 F.3d 785 (1st Cir. 1996) (limiting the scope of INA § 106(a)(10), but declining to find a constitutional violation because the statute preserves habeas corpus relief); Kalaw v. INS, 133 F.3d 1147 (9th Cir. 1997) (applying INA § 242(a)(2)(B)'s ban on review of discretionary decisions made by the Attorney General to the denial of suspension of deportation, but nonetheless finding some aspects of the Attorney General's decision outside the provision's scope).

19. This legislative trend could conceivably bolster the government's position that Congress designed INA § 241(a)(6) to give the Attorney General wide latitude concerning immigration. However, such an interpretation combined with the court-stripping provisions seems to have been too much of an encroachment on the judicial branch's power for the Court to bear.

20. *See* Brief for Respondents at 17-20, Zadvydas v. Davis, 533 U.S. 678 (2001) (No. 99-7791).

21. *See id.*

22. Under the plenary power doctrine, courts largely defer to Congress and the Executive on immigration matters out of respect for both the highly political and strongly international nature of regulating immigration. *See id.* at 17 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government" and "such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference").

23. 533 U.S. 678 (2001).

24. *Id.* at 690.

25. *Id.* at 698-99.

26. *Id.* at 701. Note, however, that not all the detainees will be released after six months. *Id.* The opinion arguably gives the Department of Justice leeway to continue jailing many of the detainees who, for example, may be part of "a small segment of particularly dangerous individuals." *Id.* at 691 (quoting Kansas v. Hendricks, 521 U.S. 346, 368 (1997)).

decreased judicial willingness to tolerate legal fictions that strip immigrants of constitutional protections. The lasting power of the decision, though, may be its reassertion of judicial review and lessening of the deference accorded to the legislative and executive powers when it comes to immigration. Nonetheless, the compromise path the majority opinion took was far from neat. The majority made no clear constitutional decisions. Nor did the court give clear guidance as to whom the opinion in fact applies.

This Note argues that *Zadvydas* is an important assertion of judicial primacy, but, as to indefinite detentions, much remains to be decided. Part I of this Note traces the history of indefinitely detaining deportable aliens, emphasizing the exceptional character of the recent trends in this area. Part II contrasts the disparate ways in which the circuits have dealt with indefinite detentions. In Part III, this Note examines the Supreme Court's ruling in *Zadvydas*. Part IV outlines the administrative and judicial reactions to some of the ruling's anomalies, paying particular attention to the vexing problem of deciding which aliens actually benefit from the decision's protections. Finally, this Note concludes that although the Supreme Court resolved the split among circuits, it failed to definitively resolve some important immigration questions.

I. A Brief History Regarding the Detention of Deportable Aliens

Until this past decade, both Congress and U.S. courts generally approved of the detention of deportable aliens for only the limited time necessarily related to effectuating removal.[27] However, diplomatic miscalculations[28] and a convergence of xenophobia and get-tough-on-crime attitudes in Congress[29] have recently led to statutory limbo. Now, aliens who have served their criminal debt to U.S. society are nonetheless being held indefinitely because the government cannot find a country to which to repatriate them.

The Immigration Act of 1917 gave the Secretary of Labor discretion in deciding to which country an alien could be deported.[30] The Act failed to

27. *See, e.g.*, Castillo-Gradis v. Turnage, 752 F. Supp. 937, 939 (S.D. Cal. 1990) (stringently enforcing former 8 U.S.C. § 1252(c), which mandated that "the Attorney General shall have a period of six months from the date of [a final removal order] . . . to effect the alien's departure from the United States" after which time the alien became subject to a supervised release program).

28. Much of the legal foundation for indefinite detention grew out of court decisions and *ad hoc* measures meant to deal with Mariel Cubans. *See* Kevin Costello, Comment, *Without a Country: Indefinite Detention as Constitutional Purgatory*, 3 U. PA. J. CONST. L. 503, 507-09 (2001). The Mariel boatlift itself, and the United States' subsequent inability to negotiate the return of Mariel Cubans convicted of crimes, are far from highlights of American diplomacy.

29. Congress passed the harsh immigration measures contained in the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) following the Oklahoma City Bombing, a horrendous crime but notable in that it was perpetrated by Americans.

30. *See* Immigration Act of Feb. 5, 1917, § 20, 8 U.S.C. § 156 (repealed 1952). Under the 1917 Act an alien could be deported "to the country whence they came or to the foreign port at which such aliens embarked for the United States;" or if they are not citizens of the country from which they embarked, and that country refuses them entry,

outline how long aliens could be held after a final removal order.[31] Federal courts, therefore, imposed a reasonable time limit on such detentions, typically ordering the release of any deportable alien held longer than four months.[32] Congress codified the reasonable limitation as part of the Immigration and Nationality Act of 1952 (INA),[33] which required the supervised release of any deportable alien whose deportation could not be effectuated within six months,[34] and stringently enforced the limitation until as recently as 1990.[35]

However, in 1990 Congress revised the INA to direct the Attorney General to continue to detain deportable aliens who had been convicted of aggravated felonies, unless the alien had been lawfully admitted for permanent residence and the Attorney General determined the alien was not a flight risk.[36] The statute was unique because for the first time it authorized indefinite detention of aliens. Nevertheless, the narrow definition of "aggravated felony" at the time ensured the measure's limited application.

In the wake of the Oklahoma City bombing, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[37] The act fundamentally altered the INA's indefinite detention provisions by affirmatively requiring the Attorney General to take into custody and detain aliens who had been convicted of aggravated felonies, controlled substances and firearms offenses, and other serious crimes, upon their release from jail and pending their removal. Furthermore, the scope of these crimes also expanded from murder and rape, to crimes punishable by a one-year sentence or more, even if commuted.[38] The 1996 law also applied retroactively.[39]

Congress relented somewhat when, later in 1996, it passed the Illegal

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then "to the country in which they resided prior to entering the country from which they entered the United States." *Id.*

31. *See id.*

32. *See, e.g.*, Saksagansky v. Weedin, 53 F. 2d 13, 16 (9th Cir. 1931) (ordering that if a deportable alien's return to Russia can not be carried out within thirty days the prisoner "be discharged from custody"); United States *ex rel.* Ross v. Wallis, 279 F. 401, 403-04 (2d Cir. 1922) (finding that any detention of a deportable alien past four months "under pretense of awaiting opportunity for deportation" amounts to "unlawful imprisonment" from which habeas relief may be afforded); Elizabeth Larson Beyer, Comment, *A Right Or A Privilege: Constitutional Protection For Detained Deportable Aliens Refused Access or Return To Their Native Countries*, 35 WAKE FOREST L. REV. 1029, 1033 (2000).

33. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

34. *Id.*

35. *See, e.g.*, Castillo-Gradis v. Turnage, 752 F. Supp. 937, 940 (S.D. Cal. 1990) (noting that the six month requirement may only be circumvented where actions on the part of the deportable alien actually cause the delay in his deportation); Dor v. District Director, 891 F.2d 997, 1002 (2d Cir. 1989).

36. *See* Immigration and Nationality Act of 1990, Pub. L. No. 101-649, 504(a), 104 Stat. 5049 (amended 1996) (former 8 U.S.C. § 1252(a)(2)(A) & (B) (1991)).

37. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

38. *Id.*

39. *Id.*

Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[40] The statute restored some discretion to the Attorney General to grant relief from detention.[41] However, under the statute, inadmissible aliens who are ordered removed, criminal aliens, aliens who have violated their non-immigrant status conditions, aliens removable for certain national security or foreign relations reasons, and any alien who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, must be held by the INS during removal proceedings and for ninety days thereafter, during which time removal should occur.[42] If the removal does not occur within ninety days, the Attorney General can continue to detain an alien who is "a risk to the community or unlikely to comply with the order of removal."[43] The act does not address how long the Attorney General can actually hold these aliens, saying only that these aliens "may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision."[44]

Administrative regulations implementing the statute allow the INS District Director to make discretionary release decisions based on several factors.[45] For example, under the regulations the alien must prove "by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk."[46] Furthermore, the INS created interim procedures for "aliens whose immediate repatriation is not possible or practicable."[47] These procedures call for automatic administrative review of post-final order detention cases both before and after the statutory ninety day removal period, and a mandatory review every six months.[48]

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40. Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 303-09, 110 Stat. 3009 (1996).

41. *Id.*

42. *See* INA § 236(c) (codified at 8 U.S.C. § 1226(c)); § 241(a)(2) (codified at 8 U.S.C. § 1231(a)(2)).

43. *Id.* § 241(a)(6) (codified at 8 U.S.C. § 1231(a)(6)).

44. *Id.*

45. *See* 8 C.F.R. §§ 241.4(c)(1), (h), (k)(1)(i) (2001). The non-exhaustive nine factors are:

> (1) The nature and seriousness of the alien's criminal convictions; (2) Other criminal history; (3) Sentence(s) imposed and time actually served; (4) History of failures to appear for court (defaults); (5) Probation history; (6) Disciplinary problems while incarcerated; (7) Evidence of rehabilitative effort or recidivism; (8) Equities in the United States; and (9) Prior immigration violations and history.

Id. § 241.4(a)(1)-(9).

46. *Id.*

47. Memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, INS, United States Department of Justice, on Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable (Feb. 3, 1999).

48. *Id.*

II. Disagreement among Circuits

A. The Ninth Circuit Approach

In 1990, a panel of five Western District of Washington judges consolidated and considered over 100 habeas corpus claims[49] filed by detained lawful permanent residents.[50] The petitioners in *Phan v. Reno*[51] challenged the constitutionality of their continued detention on both substantive and procedural due process grounds. Although the Ninth Circuit[52]and Supreme Court[53] affirmed the ruling on different grounds, the district judges' decision deserves considerable attention because its treatment of petitioners' constitutional claims portends how courts would treat the issues were a new law or implementing regulation to drive the constitutional issues back into consideration.[54]

The district court held post-removal-period detention unconstitutional unless "there is a realistic chance that [the] alien will be deported."[55] The court rejected the government's "legal fiction" argument that aliens forfeit Fifth Amendment protections because, once ordered deported, they "assimilate" to an excludable status akin to an alien arriving at the border.[56] The panel ruled that the petitioners were "all long-time permanent legal residents of the United States and, as such, are 'persons' entitled to the protection of the Fifth Amendment, despite having been ordered deported."[57]

Regarding the substantive due process claim, the judges ruled that the government had to overcome strict scrutiny to infringe upon the petitioners' fundamental liberty interest in being free from incarceration.[58] According to the court, INS detention is only justified in detaining an alien to effectuate that alien's deportation. Furthermore, continued detention is "excessive" where there is no realistic chance deportation will actually occur.[59] And, the court did not grant the usual judicial deference[60] accorded the legislative and executive branches on immigration matters. Instead, the court characterized the detention scheme as "involving domestic interests rather than international concerns."[61]

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49. The court acted pursuant to 28 U.S.C. § 2241.
50. *See* Phan v. Reno, 56 F. Supp. 2d 1149 (W.D. Wash. 1999).
51. *Id.*
52. Ma v. Reno, 208 F.3d 815 (9th Cir. 2000).
53. Zadvydas v. Davis, 533 U.S. 678 (2001).
54. *See Phan*, 56 F. Supp. 2d 1149.
55. *Id.* at 1156.
56. *Id.* at 1154. The government argued that once it lodges a final deportation order against a resident alien he has no due process guarantees; such an alien stands on equal Constitutional footing as the alien in *Shaughnessy v. United States* ex rel. *Mezei*, 345 U.S. 206 (1953), who had not legally entered the United States. *Id.* at 1153-54 (discussing application of the "entry fiction").
57. *Id.*
58. *Id.* at 1154-55.
59. *Id.* at 1156.
60. For a brief explanation of the Plenary Power doctrine, see discussion *supra* note 22.
61. *Phan*, 56 F. Supp. 2d at 1155.

Turning to the procedural due process issues common to all the petitioners, the court balanced the petitioners' fundamental right to freedom against the government's procedural safeguards.[62] The court chided the INS for depriving the petitioners of meaningful and impartial review, and even hinted that institutional bias on the part of the INS might *per se* preclude the agency from impartiality.[63] The judges found that the absence of any individualized assessment of the aliens' situation violated their due process rights, and that "at a minimum, each petitioner is entitled to a fair and impartial hearing before an immigration judge," and a right of appeal to the Board of Immigration Appeals (BIA).[64]

A district court judge applied the general constitutional framework from *Phan* to one of the resident aliens whose case had been consolidated, and ordered him released.[65] The INS appealed the ruling, and the Ninth Circuit affirmed, but on different grounds. The appellate court largely avoided the constitutional questions by holding that the INS lacked the statutory authority to detain a resident alien for more than a reasonable time past the ninety day removal period.[66]

The Ninth Circuit chose to read the reasonable limitation into the statute because such a reading allowed the court to avoid deciding the due process issues, is more reasonable than allowance of indefinite detentions in light of the history of detention statutes, and best comports with international law.[67] The court relied heavily upon the constitutional avoidance rule, under which courts avoid deciding substantial constitutional issues if a statute can be interpreted in a way that avoids the constitutional questions.[68] By invoking this doctrine, the court arguably conceded that the statute had substantial constitutional problems, but nevertheless devoted little discussion to the district court's legal findings. Given the opinion's tone, though, it seems possible that, had the court not delayed the constitutional issues by relying on statutory interpretation, it may have affirmed the district court's constitutional approach.[69]

The Ninth Circuit did, however, reiterate that, contrary to the government's contention, the resident aliens in this case deserve Fifth Amendment protections.[70] The court distinguished the lessened constitutional

62. *Id.* at 1156; *see also* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (balancing "the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures").

63. *See Phan*, 56 F. Supp. 2d at 1157.

64. *Id.*

65. Ma v. Reno, 208 F.3d 815 (9th Cir. 2000).

66. *Id.* at 818.

67. *Id.* at 822.

68. *Id.*; *see* DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

69. The court, for example, framed the issue as whether "the Attorney General has the legal authority to hold Ma, who is now twenty-two, in detention indefinitely, perhaps for the remainder of his life." *Ma*, 208 F.3d at 818.

70. *Id.* at 825.

protections afforded aliens in *Shaughnessy v. United States ex rel. Mezei*[71] and *Barrera-Echavarria v. Rison*[72] by noting that the aliens in both of those cases were excludable aliens who, for legal purposes, were treated as if they had not entered the United States.[73] But the court stressed that in general "aliens who have entered the United States, legally or illegally, are entitled to the protections of the Fifth Amendment."[74] While the court acknowledged the government's essentially unfettered power to exclude aliens, it nonetheless refused to grant the government the same discretion to deport aliens from within the United States. Finally, the court did not grant the executive and legislative branches the usual "plenary power"[75] deference accorded them on immigration matters.[76]

B. The Fifth Circuit Approach

In February of 1997 Kestutis Zadvydas applied to the district court for the Eastern District of Louisiana for habeas relief.[77] A magistrate judge recommended denying the petition, arguing simply that the detention was authorized by statute, and that the Attorney General did not abuse her discretion.[78] The district court overruled that recommendation on Fifth Amendment substantive due process grounds, arguing that indefinite detention is unduly excessive in relation to the government's goals.[79]

A considerable portion of the district court's opinion was devoted to countering the government's argument that § 306 of IIRIRA deprives courts of jurisdiction to review any claims stemming from a deportation order.[80] The court traced the history of habeas relief, ultimately deciding that IIRIRA did not repeal habeas relief, absent specific language to that effect.[81] The court also opined that if IIRIRA were meant to deny habeas relief, it might violate the Suspension Clause[82] of the Constitution.[83] Ultimately the court decided that habeas is preserved because the case con-

71. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).
72. Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995).
73. *See Ma*, 208 F.3d at 825-26.
74. *Id.* at 825.
75. *See* discussion *supra* note 22.
76. *Id.* at 826-27 (ruling that the "plenary power doctrine does not apply in the same way to each case to which it is relevant, and that its exercise is subject to constitutional restraints"); INS v. Chadha, 462 U.S. 919, 940-41 (1983).
77. *See* Zadvydas v. Caplinger, 986 F. Supp. 1011, 1013 (E.D. La. 1997).
78. *Id.*
79. *Id.* at 1023-27.
80. The INA states:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any Alien under [the Immigration and Nationality Act].

INA § 242(g) (codified at 8 U.S. C. § 1252(g)).
81. *See* Zadvydas v. Caplinger, 986 F. Supp. at 1017-19.
82. U.S. CONST. art. I, § 9, cl. 2. The Suspension Clause reads: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety many require it." *Id.*
83. Zadvydas v. Caplinger, 986 F. Supp. at 1019.

cerned "grave constitutional error or a fundamental miscarriage of justice."[84]

The district court ruled that former 8 U.S.C. § 1252(a)(2)(B)[85] could be invalid in so far as the government is able to employ the statute to go beyond permissible substantive due process limits.[86] According to the court, the statute's constitutionality depends on whether detention is excessive in relation to the statute's goals of protecting the community from aggravated felons and preventing flight—both of which the court held are legitimate state goals.[87] But the statute's primary justification, argued the court, is effectuating deportation.[88] When deportation is no longer possible, detention loses its rationale: "[P]etitioner's detention of nearly four years with no end in sight, and the probability of permanent confinement, is an excessive means of accomplishing the purposes sought to be served."[89] The detention was so excessive that it "'shocks the conscience' of the court."[90]

The INS appealed and the Fifth Circuit reversed, reasoning that Zadvydas deserved less constitutional protections than accorded him by the district court.[91] In a bow to the government's legal fictions, the Fifth Circuit relied heavily upon *Gisbert*[92] and *Mezei*.[93] The Fifth Amendment does not distinguish between citizens and non-citizens, but instead reads that "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law."[94] Nonetheless, the *Gisbert* court ruled that the government could circumvent the Fifth Amendment by reasoning that Muriel Cubans who were detained at the borders and then conditionally admitted into the country under an ad hoc "parole" scheme were legally still at the borders, though physically within the United States.[95]

The Fifth Circuit recognized that resident aliens possess some rights as people within the United States.[96] Nevertheless, the court did not describe or enforce those rights. Instead, the Fifth Circuit here carried the entry fiction one step further by reasoning that once a legally admitted resident alien who is still in the United States is ordered deported, he deserves only the minimal constitutional protection extended to an alien

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84. *Id.*

85. At the time of the suit, the INS was jailing Zadvydas pursuant to 8 U.S.C. § 1252(a)(2)(A) - (B); subsequent courts considered the constitutionality of Zadvydas' continued detention under the superseding statute, 8 U.S.C. § 1231(a)(6).

86. *See* Zadvydas v. Caplinger, 986 F. Supp. at 1011.

87. *Id.* at 1026.

88. *Id.*

89. *Id.* at 1027.

90. *Id.*

91. Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999).

92. Gisbert v. Att'y Gen., 988 F.2d 1437 (5th Cir. 1993).

93. Shaughnessy v. United States *ex rel* Mezei, 345 U.S. 206 (1953); Zadvydas v. Underdown, 185 F.3d at 285.

94. U.S. CONST. amend. V.

95. *See Gisbert*, 988 F.2d 1437. This is commonly known as the "entry fiction." *Id.* at 1440.

96. *Id.* at 1442 (stating "excludable aliens are entitled to those due process rights as are provided by law").

seeking admission at the borders.[97] Having cast the aliens' substantive due process rights as minimal, the court balanced those rights against the government's interest in effectuating a resident alien's departure.[98] Finally, the court ruled that "Zadvydas' detention is within the core area of the government's plenary immigration power, and thus does not violate substantive due process."[99]

The Fifth Circuit's ultimate holding was not too far out of step with that of the Ninth Circuit: "The government may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place."[100] Nonetheless, the reasoning Fifth Circuit took to reach that conclusion embraced legal fictions, effectively drained aliens of much of their constitutional rights, willingly accepted the plenary power doctrine, and forewent meaningful judicial review.

III. The Supreme Court Decision

Zadvydas v. Davis[101] teeters on the brink of importance. The Supreme Court largely favored the Ninth Circuit's reasoning over that of the Fifth Circuit.[102] The Supreme Court reasserted judicial review; it lessened the plenary deference accorded to the legislative and executive powers when it comes to immigration; and it upheld important due process protections for some aliens. However, because the opinion is largely a compromise, the Court made few definitive constitutional decisions on indefinite detentions, and left important areas unsettled and important questions unanswered.

Like the Ninth Circuit, the Supreme Court took the politically agile textual analysis path; the court framed the issue as whether 8 U.S.C. § 1231(a)(6) authorizes the Attorney General to detain a removable alien "*indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien's removal."[103] Though the Ninth Circuit opined in *Ma* that it could have applied the doctrine of constitutional avoidance, the court ultimately anchored its decision on the "ordinary tenets of statutory construction."[104] But the Supreme Court put all its weight behind the avoidance doctrine. According to the doctrine, when a court has serious

97. Zadvydas v. Underdown, 185 F.3d at 288-90. Such an interpretation is not only facially a fiction, but it is also a dangerous affront to liberty. The government essentially argued that it can abrogate constitutional measures designed to protect people during government proceedings based on the findings of that very infirm proceeding.

98. *Id.* at 295-97.

99. *Id.* at 294.

100. *Id.* at 297; *cf.* Ma v. Reno, 208 F.3d 815 (9th Cir. 2000).

101. Zadvydas v. Davis, 533 U.S. 678 (2001).

102. On remand, the Ninth Circuit said as much: "In *Zadvydas*, the Court essentially adopted the reasoning set forth in our opinion. . . ." Ma v. Ashcroft, 257 F.3d 1095, 1098 (9th Cir. 2001).

103. Zadvydas v. Davis, 533 U.S. at 682 (emphasis in original).

104. *Ma*, 208 F.3d at 830.

doubt as to the constitutionality of a statute the court will chose a reasonable construction of the statute that avoids the constitutional infirmity.[105] Although the Court made no explicit constitutional rulings, the avoidance approach necessitated a thorough constitutional analysis that will likely inform both future rulings on INS detention procedures and immigration law generally.

Because the statute as interpreted by the INS would raise "serious constitutional concerns," the Court read an "implicit limitation" into the detention authorization.[106] The Court ruled that the "statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention."[107] Having decided that the statute is ambiguous, the Court concluded that once "removal is no longer reasonably foreseeable," continued detention can no longer be authorized by the statute.[108]

A. Renewed Judicial Oversight

Zadvydas signals new rigor in judicial oversight of both immigration legislation and administrative decisions. Given the government's original argument that 8 U.S.C. § 1252[109] deprived the courts of jurisdiction,[110] it is perhaps noteworthy that *Zadvydas* was even heard. The Supreme Court based its jurisdiction on the habeas provisions of 28 U.S.C. § 2241.[111] The Court reasoned that whether a given detention is reasonably necessary to bring about removal bears on whether that detention is pursuant to statutory authority.[112] If a given detention is not reasonably necessary, then it is not authorized by statute, and habeas relief is warranted.[113] Courts ought not, as the government suggested, simply "accept the Government's view" about whether a particular incarceration is statutorily authorized, but must conduct an "independent" judicial review.[114]

The court also made significant inroads on the court stripping provision in 8 U.S.C. § 1252.[115] The government had argued during the cases' initial stages that this court-stripping statute immunized discretionary Attorney General decisions, such as whether and for how long to detain

105. Zadvydas v. Davis, 533 U.S. at 689; United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994); Crowell v. Benson, 285 U.S. 22, 62 (1932); United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

106. Zadvydas v. Davis, 533 U.S. at 689.

107. *Id.*

108. *Id.* at 699.

109. "[N]o court shall have jurisdiction to review" decisions "specified. . . to be in the discretion of the Attorney General." INA § 242(a)(2)(B)(ii) (codified at 8 U.S.C. § 1252(a)(2)(B)(ii)).

110. *See* Zadvydas v. Caplinger, 986 F. Supp. 1011, 1015-19 (E.D. La. 1997).

111. Zadvydas v. Davis, 533 U.S. at 687.

112. *Id.* at 699-700.

113. *See id.* at 699.

114. *Id.* at 688.

115. *Id.* at 686-88.

aliens, from judicial review.[116] The government later abandoned this concededly far-reaching rationale,[117] but the Supreme Court nonetheless isolated 8 U.S.C. § 1252.[118] The Court reasoned that the petitioners were not challenging the Attorney General's actual decision but the constitutional extent of the Attorney General's authority.[119] This test seems to preserve most constitutional challenges to administrative decisions, since these challenges question the constitutional validity of the scheme under which the Attorney General makes his or her decision, not the decision itself. And many challenges previously framed as error could possibly be remade into substantive or procedural due process claims. If the Attorney General makes a discretionary decision in an arbitrary way, the decision might be reviewable because it would exceed the Attorney General's authority under the Constitution, and consequently under any statute. If the Attorney General makes a discretionary ruling implicating a fundamental right that is clearly in error, the statutory scheme that allowed such a ruling is open to attack as containing procedural due process shortfalls.

The Court also alluded to separation of powers concerns should court stripping be carried too far.[120] The Court cited a case[121] for the proposition that the Constitution may forbid giving "an administrative body the unreviewable authority to make determinations implicating fundamental rights."[122] The "fundamental right" presumably implicated is the alien's liberty interest. Although the Court centered its avoidance rationale around this interest, the court never clearly delineated the scope of this fundamental liberty interest.[123] So, like much of the opinion, the true weight of this language will only be understood through future case law.

Furthermore, the *Zadvydas* Court reasserted the power of judicial review by cutting into the plenary power doctrine.[124] The government had relied heavily on that doctrine, arguing that the judicial branch must defer to the executive and legislative branches on immigration issues because of the political and international character of immigration.[125] After noting that the doctrine is "subject to important constitutional limitations," the

116. *See* Zadvydas v. Caplinger, 986 F. Supp. 1011, 1016 (E.D. La. 1997) (stating the government's position that "because of Section 1252(g) [it] contends that. . . this Court lacks jurisdiction to entertain the petitioner's claims").

117. *See* Brief for Respondents at 93, Zadvydas v. Davis, 533 U.S. 678 (2001) (No. 99-7791).

118. Zadvydas v. Davis, 533 U.S. at 688.

119. *Id.*

120. *Id.* at 688-89.

121. Superintendent, Mass. Corr. Inst. at Walpole v. Hill, 472 U.S. 445, 450 (1985).

122. Zadvydas v. Davis, 533 U.S. at 692 (citing Superintendent, Mass. Corr. Inst. at Walpole v. Hill, 472 U.S. 445, 450 (1985)).

123. *See id.* at 696 (holding that "an alien's liberty interest is, at the least, strong enough to raise a serious [constitutional] question(s)").

124. *Id.* at 695-96.

125. *Id.*; *see* Brief for Respondents at 19, Zadvydas v. Davis, 533 U.S. 678 (2001) (No. 99-7791) (arguing that the Attorney General's decision to detain an alien under a final deportation order be accorded "substantial deference").

Court attacked the intellectual underpinnings of the doctrine.[126] The majority noted that judicial deference on immigration issues is rooted in the idea that foreign policy concerns are better left to the expertise of the other two governmental branches.[127] The Court reasoned that only those immigration decisions tightly connected to foreign policy concerns, then, ought to be accorded deference: "The sole foreign policy considerations the Government mentions here is the concern lest courts interfere with 'sensitive' repatriation negotiations . . . But neither the Government nor the dissents explain how a habeas court's efforts to determine the likelihood of repatriation, if handled with appropriate sensitivity, could make a significant difference in this respect."[128] This side-step past the plenary power doctrine could have wide ramifications throughout immigration law.

The *Zadvydas* Court did not accept the government's strong argument that the Attorney General's decision involved foreign policy concerns.[129] Instead, the Court made a scrutinizing judicial inquiry that narrowly focused on the act of incarceration rather than the larger international scheme of which incarceration was simply a part. The manner by which aliens are deported is far more connected to the sovereignty of the nation and foreign policy issues than the welfare benefits scheme that the court - invoking the plenary powers doctrine - chose to exempt from judicial scrutiny in *Diaz*.[130] In *Zadvydas* the government was not regulating benefits aliens receive while in the country, but more the process by which aliens are extracted from the country.[131] That process was closely tied to negotiations with foreign powers.[132] In fact, the Court's ultimate ruling, according to Justice Kennedy's dissent, "would require the Executive Branch to surrender its primacy in foreign affairs and submit reports to the courts respecting ongoing negotiations in the international sphere."[133] Clearly, the *Zadvydas* decision has eroded the plenary power doctrine. The government must now make a strong showing of how foreign policy is implicated before the courts can rely on the plenary power doctrine.

Finally, *Zadvydas*' practical holding is emblematic of the Court's favorable attitude toward judicial oversight. The test the Court created to

126. Zadvydas v. Davis, 533 U.S. at 695-96; *see also* INS v. Chadha, 462 U.S. 919, 941-43 (1983) (discussing Plenary Power doctrine).

127. Zadvydas v. Davis, 533 U.S. at 695-96.

128. *Id.* at 696 (citations omitted).

129. The actual repatriation of aliens, and the negotiation of repatriation treaties, both of which are central to the detention of these aliens, are particularly tied to the foreign relations power of the executive. *Id.*

130. Mathews v. Diaz, 426 U.S. 67 (1976). In *Mathews*, the Court invoked the plenary power doctrine in declining to interfere with a medical insurance program that required an alien to be a resident for five years before he or she could collect government benefits. *Id.* at 81-84. Any connection that welfare scheme had with foreign relations was arguably quite attenuated. Although the benefits that the United States gives to aliens perhaps influences to what extent those from abroad will want to move to the United States, the same, or perhaps a stronger, argument could be made about indefinite detentions.

131. *See* Zadvydas v. Davis, 533 U.S. at 695-96.

132. *See id.* at 725. (Kennedy, J., dissenting).

133. *Id.*

judge whether a particular detention is statutorily authorized hinges on a judicial inquiry into the likelihood of repatriation.[134] The Court did not simply defer to the government's views on a given repatriation.[135] Nor did the Court endorse the Fifth Circuit's holding, which put the onus on the alien to prove that repatriation is "impossible."[136] For the sake of historical consistency and administrative ease, the Court allowed six months of presumptively reasonable jailing.[137] After six months, though, if an alien provides "good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future, the government must respond with evidence sufficient to rebut that showing."[138] The majority not only refused to defer to the executive branch on the constitutionality of the detention scheme, it also asserted its power of judicial review over the quintessentially executive branch function of determining the likelihood of repatriation.[139]

The Court has squarely inserted itself into the realm of indefinite detentions. The courts are a long way from the government's initial argument that the judiciary could not even consider Zadvydas' claim.

B. Greater Due Process Protections for Some Aliens

The Supreme Court in *Zadvydas* ruled that detentions of aliens beyond a period reasonably necessary to secure the alien's removal "would raise serious constitutional concerns."[140] But because the Court read 8 U.S.C. § 1231(a)(6) as allowing only for reasonable detentions, the Court made no explicit constitutional findings. Nonetheless, the majority opinion shows a commitment to strengthening substantive and procedural due process for resident aliens, perhaps even to the level accorded citizens.

The Court seemed to repudiate the line of cases upon which the Fifth Circuit relied, and boosted the general constitutional protection afforded resident aliens. The government had argued that *Shaughnessy v. United States ex rel. Mezei*[141] sanctioned lessened constitutional protection for unadmitted aliens, particularly in the area of detention.[142] In the Korean War era case of *Mezei*, the Court rejected the constitutional claims of an

134. *Id.* at 701 (holding that "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future").

135. *Id.*

136. *Id.* at 702; *see* Zadvydas v. Underdown, 185 F.3d 279, 294 (5th Cir. 1999).

137. Zadvydas v. Davis, 533 U.S. at 701.

138. *Id.*

139. *See id.* Justice Kennedy sensed the import of this judicial oversight in his dissent. He would have rather concentrated the judicial inquiry on whether there were adequate procedural safeguards in place to determine an alien's dangerousness. *Id.* at 724-25 (Kennedy, J., dissenting). Justice Kennedy argued that "the Court's rule is a serious misconception of the proper judicial function" because "[h]igh officials of the Department of State could be called on to testify" about repatriation negotiations. *Id.* at 725 (Kennedy, J., dissenting).

140. *Id.* at 682.

141. 345 U.S. 206 (1953).

142. *See* Brief for Respondents at 35, Zadvydas v. Davis, 121 S. Ct. 2491 (2001) (No. 99-7791).

alien who had left the United States and was seeking readmission at Ellis Island.[143] The government has since relied on *Mezei* and its progeny to justify lessened constitutional protections for those aliens "paroled" into the United States. Parole is a legal fiction whereby the government allows an alien physical entry into the United States, but for constitutional and legal purposes treats the alien as still being at the border seeking entry.[144] The government started this questionable practice to, on a case by case basis, ease the burdens of the processing procedure. The government has subsequently invoked the doctrine to admit large numbers of aliens into the United States, while simultaneously denying those aliens the constitutional protections they would have enjoyed under normal immigration procedures.[145] Preceding *Zadvydas*, the government added to this admittedly odd legal fiction by further arguing that aliens who had been properly admitted and who lost their status while still in the United States were the legal equivalent of aliens seeking admission at the border, and thus did not deserve constitutional protection.[146]

The Supreme Court refused to accept this double entry fiction.[147] The majority ruled that "once an alien enters the country, the legal circumstances change, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[148] In a significant move the Court isolated *Mezei* to its facts, ruling that Mezei's "extended departure" required him to seek admission again, and that his "presence on Ellis Island" did not count as entry into the United States.[149] He did not deserve the full extent of Fifth Amendment protections because he was at

143. *See* Shaughnessy, 345 U.S. 206.

144. Parole started as a practice whereby aliens were conditionally allowed into the country, pending a decision on their admissibility. For legal purposes the aliens were treated as if at the border, and remained subject to exclusion hearings. This practical necessity was codified in 1952 at INA § 212(d)(5), which allowed the Attorney General to parole into the country aliens "temporarily under such conditions as he may prescribe for emergent reasons or reasons deemed strictly in the public interest." Though parole was originally designed to deal with the practical necessities of processing immigrants, the Attorney General has used his flexible parole power to conditionally admit large numbers of refugees from such countries as Hungary, Indochina, and Cuba. As parolees have not technically been admitted into the United States, their legal status is the subject of considerable debate. *See generally* ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 507-10 (4th ed. 1998). For a discussion of the history of parole, see CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 62 (2002).

145. GORDON, MAILMAN & YALE-LOEHR, *supra* note 144.

146. *Id.*; *see also* Ho v. Greene, 204 F.3d 1045, 1058-59 (10th Cir. 2000) (finding that after a final deportation order alien has no greater right to be released into the United States than an alien seeking admission at the border).

147. Zadvydas v. Davis, 533 U.S. 678, 692-93 (2001). The fiction is double insomuch as the government not only argued that aliens paroled into the United States were not in the United States for legal purposes, but that those who gained admission legally could then be stripped of any protections they supposedly had and treated as if they too were paroled into the United States. *Id.*

148. *Id.* at 693; *see* Plyler v. Doe, 457 U.S. 202, 210 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976).

149. Zadvydas v. Davis, 533 U.S. at 693.

the border seeking admission.[150] So, even though ordered deported, aliens such as Zadvydas, who are physically present in the United States are still "people" under the authority of the United States, and thus deserving of Fifth Amendment protections. In a perfunctory nod to the precedents upon which the government relied,[151] the majority did acknowledge that "the nature of that protection may vary depending on status and circumstances."[152]

Nonetheless, the Court's equivocating treatment of the entry fiction and its failure to explicitly overrule *Mezei* has created a great deal of judicial confusion about whether parolees also deserve due process rights.[153] In January 2001 the Sixth Circuit had essentially relegated *Mezei* to its historical era.[154] In *Rosales-Garcia v. Holland* the Sixth Circuit reasoned that the lessened protections of *Mezei* was a relic of judicial deference to national security during the Korean War and declined to uphold the case's present application.[155] But after the Supreme Court's ruling in *Zadvydas* the Sixth Circuit reconsidered its stance, ruling that *Zadvydas* preserved much of *Mezei*.[156] Other courts have also embraced this rationale[157]—that in declining to extend *Mezei*'s lessened protections to resident aliens deemed removable, the Supreme Court implicitly affirmed *Mezei*'s application to paroled aliens.[158]

Having ruled that the resident aliens at issue deserve Fifth Amendment protection, the Court found serious substantive due process concerns with an interpretation of 8 U.S.C. § 1231(a)(6) that would allow indefinite detentions.[159] The majority framed the substantive due process question quite liberally, noting that "freedom from imprisonment . . . lies at the heart of the liberty that the [Due Process] Clause protects."[160] The Court acknowledged that detention may be ordered as part of criminal proceedings with adequate procedural protections, and in special, narrow circumstances such as where dangerous mental illness outweighs liberty concerns.[161] But immigration detention is civil and non-punitive.[162] The

150. *Id.* (noting that his status as an excludable alien "made all the difference").
151. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21 (1982).
152. Zadvydas v. Davis, 533 U.S. at 694.
153. For a discussion of parole, see discussion *supra* note 144.
154. *See, e.g.*, Rosales-Garcia v. Holland, 238 F.3d 704 (6th Cir. 2001).
155. *Id.* at 719-21.
156. *See* Carballo v. Luttrell, 2001 U.S. App. LEXIS 21695 at *40-43 (6th Cir. Oct. 11, 2001).
157. *See, e.g.*, Vera v. Estrada, No. 3-01-CV-1044-X, 2001 U.S. Dist. LEXIS 17790 (N.D. Tex. Oct. 31, 2001); Fernandez-Fajardo v. INS, 193 F. Supp. 2d 877 (M.D. La. 2001). For a discussion of parole, see *supra* note 144.
158. For a detailed discussion of why such a reading is unwarranted, see *infra* Section V.
159. Zadvydas v. Davis 533 U.S. 678, 690-93 (2001).
160. *Id.* at 690.
161. *Id.* 690-91.
162. *Id.* A claim could be made that the detentions are in fact punitive. Among the factors that the INS can consider in deciding whether to continue to jail an alien are "the nature and seriousness of the alien's criminal convictions . . . other criminal history . . . sentence(s) imposed and time actually served . . . evidence of rehabilitative effort or

court dismissed the government's two purported[163] reasons for detention as not "sufficiently strong" enough to justify an indefinite infringement on an alien's liberty interest.[164] First, the justification of preventing flight "is weak or non-existent where removal seems a remote possibility at best."[165] Second, protecting the community would only suffice when applied to particularly dangerous criminals who have been afforded strict procedural safeguards.[166] The government's interpretation of the statute was far too broad; under its reading the statute would apply equally to those whose chance of removal ranges from forthcoming to impossible, and to those whose dangerousness ranges from severe to minimal.[167]

While the Court's substantive due process analysis might have wide application,[168] the Court's procedural due process analysis seems limited. Because it relied on the avoidance doctrine, the Court never truly ruled on the constitutionality of the procedural scheme the INS uses to decide who is to be detained and for how long. Also, the Court largely rested its constitutional analysis on substantive due process grounds: "We believe that an alien's liberty interest is, at the very least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent."[169] The majority opinion was particularly concerned, though, that the "sole procedural protections" are part of "administrative hearings" where the alien bears the burden of proving he is not dangerous, without later "serious" judicial review.[170] It follows, then, that a procedure that puts the burden of proof on the government and more intimately involves the judici-

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recidivism." 8 C.F.R. § 241.4(a)(1)-(9). Essentially, those whose crimes were serious, those who were not punished enough, and those who have not been rehabilitated ought to remain in jail. Such considerations seem dangerously close to punishment. Double jeopardy and equal protection claims might flow from such a finding, as the government is punishing these aliens twice for one crime, and the government is targeting only aliens for this harsh treatment. A finding that these detentions are punishment might also involve a separation of powers analysis, as the executive is taking on a largely judicial function in determining whom to punish.

163. Zadvydas v. Davis, 533 U.S. at 690-91.

164. *Id.*

165. *Id.* at 690.

166. *Id.* at 691.

167. *See id.*

168. *See, e.g.*, Sorbo v. Reno, No. 98 CV 6154, 2001 U.S. Dist. LEXIS 17497 at *5 (E.D.N.Y. Oct. 23, 2001) (relying on *Zadvydas* for the general proposition that "arbitrary detention of aliens for lengthy periods may violate the constitution," and releasing a resident alien pending a discretionary deportation relief hearing).

169. Zadvydas v. Davis, 533 U.S. at 696 (citations omitted).

170. *Id.* at 700. Administrative regulations allowed for administrative review of post-final order detentions cases every six months, where the INS District director would determine "whether there has been a change in circumstances that would support a release decision." Memorandum from Michael A. Pearson, *supra* note 47. Under the interim procedure, an alien could only appeal a District Director's decision to the Board of Immigration Appeals if the alien had initiated the detention review by written or oral request. Otherwise, there was no review and an alien's continued detention was at the Attorney General's discretion. *Id.*

ary would presumably be more in line with procedural due process requirements.

C. The Dissenting Opinions

Justice Scalia wrote a short dissent with which Justice Thomas concurred.[171] Justice Scalia framed the asserted right as narrowly as possible—"a constitutional right of supervised release into the United States."[172] According to Justice Scalia the case was not about whether the government can jail a person indefinitely, for he largely presumed the government has such power.[173] Rather, Justice Scalia asked whether there exists "a right of release into this country by an individual who *concededly* has no legal right to be here."[174] The implications of such a constitutional contortion are frightening because his analysis shifted the intellectual burden of persuasion by implicitly assuming that an individual seeking constitutional protection point to a specific clause protecting the specific conduct in which he wants to engage.[175] Because most fundamental rights are not so particularly described, such a reading would cut short many important constitutional protections.

Justice Scalia accepted the government's double entry fiction, reasoning that aliens ordered deported "stand on equal footing with an inadmissible alien at the threshold of entry."[176] Because aliens who are not in fact in the United States have no right of entry into the United States, he reasoned that aliens ordered deported also have no right of "release into the country."[177] This rationale guts the Fifth Amendment of much of its meaning. The Fifth Amendment clearly accords all "people" due process protection.[178] Why would the Fifth Amendment accord rights to people rather than citizens if the government could simply trample on the rights of noncitizens by first ordering them deported?

Justice Kennedy wrote a more nuanced dissent with which Justices Rehnquist, Thomas and Scalia joined.[179] Justice Kennedy was most concerned with the majority's statutory construction and the difficulties that

171. Zadvydas v. Davis, 533 U.S. at 702-05.

172. *Id.* at 702 (Scalia, J., dissenting). Note, however, that the aliens at issue are in fact inside the United States.

173. *Id.*

174. *Id.* at 703 (emphasis in original).

175. Justice Scalia has used this tactic in other cases as well. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (narrowing the definition of the right to privacy in finding no "fundamental right upon homosexuals to engage in sodomy").

176. Zadvydas v. Davis, 533 U.S. at 704 (Scalia, J., dissenting).

177. *Id.* Justice Scalia admitted that the United States probably can not torture deportable aliens. *See id.* But he does not really explain why the protection afforded deportable aliens ought to lie somewhere between jailing and torture. Furthermore, Justice Scalia's analysis could easily be carried to extremes, allowing for jailing anyone not legally admitted to the United States. *See id.*

178. U.S. CONST. amend. V ("No person . . . shall be . . . deprived of life, liberty, or property, without due process of law").

179. Justices Thomas and Scalia only joined in Part I of Kennedy's dissent. Zadvydas v. Davis, 533 U.S. at 705 (Kennedy, J., dissenting).

may accompany the Court's plan to review detentions.[180] Justice Kennedy argued that the statute is "straightforward," and not susceptible to two meanings, so constitutional avoidance ought not play a part in the analysis.[181] Further, he argued that the reasonable limitations the majority read into 8 U.S.C. § 1231(a)(6) would defeat the statutory purpose of protecting the community; the most dangerous criminals might be released first under the majority's test because they would be the most difficult to repatriate.[182] Kennedy argued that the majority's test places too much emphasis on the likelihood of repatriation, and not enough on the danger the alien poses to the community or his flight risk.[183] Further, Justice Kennedy was concerned that the majority's test would disrupt the balance of powers: the test would give "to the Judicial Branch the power to summon high officers of the Executive to assess their progress in conducting some of the Nation's most sensitive negotiations with foreign powers . . . ."[184]

IV. Remaining Questions

Zadvydas may symbolize a weakening of the plenary power doctrine and a bolstering of due process protections for some aliens. However, the opinion was not particularly clear-cut. As a matter of statutory construction, the majority's test is admittedly peculiar. The manner in which the test will operate in practice remains to be seen. The statutory construction angle required that much be left vague. The administration and the lower courts will likely struggle with the opinion's import. The crucial question of exactly what class of immigrants falls under the ruling, for instance, is still unclear. And the ultimate question—whether indefinite detentions are constitutional—remains unanswered.

A. Is *Zadvydas* Workable?

The Supreme Court's statutory construction approach necessarily created an odd standard by which to judge whether continued detention comports with the Constitution. Justice Kennedy's dissent was concerned that as a practical matter, release will now depend not so much on the danger to the community posed by the alien but on the likelihood of repatriation.[185] As a matter of statutory construction, this is an important critique. The majority's implied reasonability test creates an anomaly in which the most dangerous, and hence most difficult to repatriate, criminals move to the front of the release line. Such a result is not easily ascribed to Congress.

However, reading the likelihood of repatriation out of the statute, as Justice Kennedy might have us do, would create other grave Constitutional concerns. A statute that fails to consider the likelihood of repatriation would bear little relation to its objective. Absent a likelihood of repatria-

180. *Id.* at 705-06.
181. *Id.* at 706.
182. *Id.* at 709.
183. *Id.* at 710.
184. *Id.* at 705.
185. *Id.* at 709.

tion, the statute and implementing scheme would place most of its weight on an alien's dangerousness to the community and such a scheme would neither involve foreign policy concerns, nor would it deserve the full protection of the plenary power doctrine.[186] Thus, the due process concerns the majority attached to the present scheme would only be amplified.

Furthermore, double jeopardy[187] and equal protection[188] problems might also arise under such a dangerousness focused test. As the likelihood of repatriation figures less prominently in a detention determination, incarceration seems less like a necessary byproduct of an immigration procedure and more like punishment.[189] When the administration decides whom to jail based only on such factors as "the nature and seriousness of the alien's criminal convictions," "other criminal history," "sentence(s) imposed and time actually served," and "evidence of rehabilitative effort or recidivism,"[190] it is largely replicating the original criminal court proceedings and imposing its own second sentence. Further, the government is targeting aliens and not citizens for this harsh treatment of double sentencing. While *Zadvydas* did not address this argument, the Justices certainly played with the possibility in oral argument, expressing concern that the government may be trying to "take one category of people who commit the same offense and subject them to harsher punishment than another class."[191]

In his dissent, Justice Kennedy found separation of powers problems with a test that involved the likelihood of repatriation, calling judicial review of such a test "unprecedented, unfortunate, and unwise."[192] But an administrative inquiry that does not center on repatriation would also skew the proper separation of powers. Justice Kennedy labeled "concepts of flight risk or future dangerousness" as "manageable legal categories."[193] He was right. Imposing punishment based on such factors as the seriousness of the offense and the dangerousness to the community is a prototypically judicial function. Not only should the executive not be able to perform this essentially judicial task, but the executive should not be allowed to unilaterally second-guess judicial sentences on those whom it sees fit.

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186. The government's sole foreign policy objection to judicial review of administrative rulings under 8 U.S.C. § 1231(a)(6) was that the judiciary might interfere with "sensitive" repatriation treaties. Zadvydas v. Davis, 533 U.S. 678, 696 (2001); Brief for Respondents at 21, Zadvydas v. Davis, 533 U.S. 678 (No. 99-7791). Therefore, a ruling on an alien's dangerousness would have practically no foreign policy implications.

187. U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

188. U.S. CONST. amend. XIV ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

189. *See* Gisbert v. Att'y Gen., 988 F. 2d 1437, 1442 (5th Cir. 1993) (finding that detention pending exclusion not illegal punishment because it could be seen as a necessary byproduct of the process of expelling an alien).

190. 8 C.F.R. § 241.4(f).

191. Oral Arguments, Zadvydas v. Underdown, Feb. 12, 2001, U.S. Trans LEXIS 12.

192. Zadvydas v. Davis, 533 U.S 678, 718 (2001) (Kennedy, J., dissenting).

193. *Id.* at 725.

Likewise, if the likelihood of repatriation is to be a factor, the dissenters would have had the courts simply accept the government's findings.[194] But to defer to the prosecutor and the jailor concerning the rationale for keeping a prisoner jailed is not befitting a court, nor a government centered around the idea of checks and balances.

B. The Administrative Reaction

Predictably, the Bush administration will read *Zadvydas* quite narrowly. A memorandum issued on July 19, 2001 by Attorney General John Ashcroft interprets the case only as applying to aliens "who have been admitted into the United States."[195]

Attorney General Ashcroft said that the Department of Justice intends to obey any forthcoming court orders based on the *Zadvydas* decision.[196] But he cautioned that the department will attempt to invoke other grounds for continuing to hold many of the aliens.[197] First, the Department of Justice will try to establish bona fide reasons for continuing to hold these aliens, either by finding state or local criminal sentences that they have not yet served or by bringing additional criminal charges against them.[198] Additionally, the Department of Justice is working to develop procedures to continue to hold aliens whose detention is justified by what the Court called "special circumstances," such as terrorists and "especially dangerous criminals."[199] The INS is developing regulations to "adequately define" this special category and to "provide constitutionally sufficient procedural protections to those aliens."[200] The department also hopes to create stringent release conditions, such as registration requirements and limitations on certain activities.[201] These release conditions will "maximize public protection," and if violated, afford the Department a pretext to return aliens to custody.[202]

Finally, Attorney General Ashcroft said that the State Department will pressure aliens' home countries to "live up to their international obligations and repatriate them."[203] The Attorney General also took the unusual step of threatening to direct the State Department not to issue immigrant or non-immigrant visas to nationals of countries that refuse to accept criminal aliens from the United States "if necessary to protect the American peo-

194. *See id.* at 717.

195. Memorandum from Attorney General John Ashcroft to INS Acting Commissioner, 66 Fed. Reg. 38,433 (July 19, 2001).

196. *See Attorney General Outlines DOJ's Response to Recent Case on Detaining Criminal Aliens*, Legal News, 70 U.S. L. WEEK 2077, 2077 (Aug. 7, 2001).

197. *Id.*

198. *Id.*

199. *Id.*

200. Memorandum for Attorney General John Ashcroft to INS Acting Commissioner, 66 Fed. Reg. 38,433, 38,434 (July 24, 2001).

201. *Attorney General Outlines DOJ's Response To Recent Case on Detaining Criminal Aliens*, *supra* note 196, at 2078.

202. *Id.*

203. *Id.* at 2077.

ple."[204] He said that this visa sanction would be an "enormous incentive" for countries to negotiate repatriation treaties.[205]

The administrative reaction underscores the importance of judicial review. The government had emphasized that it took the detainees' liberty interests seriously, that it worked diligently in trying to secure travel documents for these aliens,[206] and that the entire process ought to be left to the executive.[207] But with the Supreme Court's ruling in *Zadvydas*[208] and the imminent release of many detained aliens, the administration has found new vigor in trying to secure repatriation, basically admitting that more could previously have been done to secure these aliens' release. This kind of judicial check on government action, and inaction, is a necessary part of democracy—particularly when fundamental rights are implicated.

Similarly, Attorney General Ashcroft's promise to bring additional criminal charges against many of these indefinitely detained aliens[209] begs the question: why was that not done before, particularly if there was little likelihood of repatriation? The government should not have been circumventing the strict constitutional protections of the criminal justice system by instead relying on an idiosyncrasy of an immigration statute that questionably allowed for indefinite detentions under a far more lenient, discretionary standard. By now bringing additional criminal charges against these indefinitely detained aliens, the administration implies that it was doing as much.

Finally, the administration's effort to fit some alien detentions within the loopholes *Zadvydas* left open is technically within the letter of the ruling but perhaps not its spirit. The *Zadvydas* Court did not make a clear-cut ruling. Because it used an avoidance doctrine, the Court had to make a concerted effort to affirm and distinguish several narrowly defined civil detention schemes, all of which contain heightened procedural protections.[210] The government thus hopes that a more narrowly defined alien detention rule that contains increased procedural safeguards will meet constitutional muster.[211]

Note, however, that constructing such a regulation would require more than simply adding procedural window dressing. The statute would have to target an especially dangerous group of individuals, and incarceration should generally not be potentially indefinite. The *Zadvydas* Court did not

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204. *Id.*

205. *Id.*

206. *See* Brief for Respondents at 7, Zadvydas v. Davis, 121 S. Ct. 2491 (2001) (No. 99-7791).

207. *See id.*

208. Zadvydas v. Davis, 533 U.S. 678 (2001).

209. *Attorney General Outlines DOJ's Response To Recent Case on Detaining Criminal Aliens*, *supra* note 196, at 2077.

210. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 747-48 (1987) (upholding pretrial detention for the "most serious of crimes," provided there are "stringent time limitations").

211. *See Attorney General Outlines DOJ's Response To Recent Case on Detaining Criminal Aliens*, *supra* note 196, at 2077-78.

rest its decision on the procedural shortfalls surrounding 8 U.S.C. § 1231(a)(6), but instead emphasized the alien's substantive liberty interest.[212] The Court distinguished constitutional civil confinements allowed to infringe on liberty interests with the alien detentions under 8 U.S.C. § 1231(a)(6) by noting that the latter are "potentially permanent."[213] Thus, an allowable alien detention scheme might, for example, target deportable aliens whose repatriation is forthcoming, but who have a particularly dangerous trait.[214]

Important political questions would surround any such statute or regulation. If there is an imposing threat to the public from a narrow class of people—like pedophiles for example—why create a statute that only targets deportable alien pedophiles and not pedophiles in general (aside, of course, from animosity towards aliens)? Once a particularly dangerous threat to the population has been identified, all those who possess that threat, not just aliens, should be civilly detained. Deportable aliens who are an overwhelming threat to the general population ought to be confined under existing civil detention schemes that also apply to the general population. To create new civil detention schemes that only apply to aliens to circumvent the *Zadvydas* ruling seems a disingenuous and artificial remedy.

C. To Whom Does *Zadvydas* Apply?

The most important question left clouded by *Zadvydas* was to whom the decision actually applies. Attorney General Ashcroft's memorandum reasons that *Zadvydas* "does not apply to those aliens who are legally still at our borders or who have been paroled[215] into the country (such as Mariel Cubans)."[216] When nearly 125,000 Cubans arrived in the United States during the Mariel Boatlift in 1980, the U.S. government declined to legally admit these aliens and the government instead passed special legislation labeling them as parolees.[217] So, although these aliens have been present in the United States for over twenty years, for legal purposes the government treats them as if they are still at the border seeking admission.[218]

Since the *Zadvydas* decision, most courts that have considered the issue have concurred with the government's interpretation and have declined to extend the case's protections to aliens paroled into the coun-

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212. Zadvydas v. Davis, 533 U.S. at 696.

213. *Id.* at 691.

214. *See* Kansas v. Henricks, 521 U.S. 346, 357 (1997). As the Court explained in *Henricks*, "It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty." *Id.*

215. *See supra* note 144.

216. Memorandum from Attorney General John Ashcroft to INS Acting Commissioner, 66 Fed. Reg. 38,433, 38,434 (July 19, 2001).

217. *See* 8 U.S.C. § 1182 (d)(5)(A); 8 C.F.R. § 212.12 (parole determinations and revocations for Mariel Cubans); GORDON, MAILMAN & YALE-LOEHR, *supra* note 144, § 62.01; *see also* Costello, *supra* note 28.

218. For a discussion of the parole concept, see *supra* note 144.

try.[219] This is certainly a reasonable reading of the opinion. But the issue is far from clear-cut. The Minnesota District Court in *Borrero v. Aljets*[220] considered the issue in great detail and explicitly ruled that the reasonable detention time mandated by *Zadvydas* does, in fact, extend to aliens paroled into the United States.

Much of this confusion springs from the fact that the *Zadvydas* Court purposefully purported not to have ruled on the matter. But Justice Stevens and the *Borrero* Court are nonetheless correct that the *Zadvydas* Court's method of imposing constitutional checks on the indefinite detention of resident aliens naturally extends to the treatment of parolees.

The majority opinion in *Zadvydas* insinuated that its ruling did not apply to paroled aliens,[221] yet much of the Court's more sweeping language seemed to imply that paroled aliens might deserve Fifth Amendment protection. For example, the Court stated that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem."[222] And, the Court noted that the Due Process Clause applies to all "'persons' within the United States, whether their presence here is lawful, unlawful, temporary, or permanent."[223] To allow Congress to subvert this constitutional principle by the legislative fiction of parole could strip the Due Process Clause of much of its import.[224] Further, depriving parolees of Fifth Amendment protection while according unlawful immigrants protection might also have disastrous public policy implications. Such a policy would essentially promote violation of immigration laws. Unlike illegal immigrants, many parolees have shown respect for our admissions system and the rule of U.S. law. Often the government resorted to the legal fiction of parole to admit immigrants because of a lack of flexibility in the immigration laws that the government itself created. Paroled aliens should not lose out on important constitutional protections because of Congress' legislative failings.

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219. *See, e.g.*, Carballo v. INS, No. 99-5698, 2001 U.S. App. LEXIS 21695 at *40 (6th Cir. Oct. 11, 2001) (finding *Zadvydas* inapplicable to the detention of an excludable Mariel Cuban); Vera v. Estrada, No. 3-01-CV-1044-X, 2001 U.S. Dist. LEXIS 17790 at *3 (N.D. Tex. Oct. 31, 2001) (declining to extend *Zadvydas'* rationale to a Mariel Cuban); Fernandez-Fajardo v. INS, 193 F. Supp.2d 877, 885 (M.D. La. 2001) (reading *Zadvydas'* language to imply that *Zadvydas* only places a "reasonable time" limitation on the post-removal-period detention of aliens who have "indeed entered the country; and the Court would probably treat the excluded aliens differently").

220. Borrero v. Aljets, 178 F. Supp. 2d 1034 (D. Minn. 2001).

221. *See* Zadvydas v. Davis, 533 U.S. 678, 710-11 (2001) (stating that "aliens who have not yet gained initial admission to this country would present a very different question").

222. *Id.* at 690.

223. *Id.* at 693.

224. If the courts were to accept that parolees lie outside the Fifth Amendment's protections, the government could simply label all immigrants as parolees until they receive citizenship. Then only citizens would gain Fifth Amendment protection. Such a move would certainly be at odds with the clear language of the Fifth Amendment and the Supreme Court's interpretation in *Zadvydas*. What the government clearly could not do in the aggregate, it should not be able to do in the particular.

The Court's constitutional avoidance approach also points to a wider application of constitutional protection. In his dissent, Justice Kennedy pointed out that 8 U.S.C. § 1231(a)(6) permits the detention of both removable and inadmissible aliens.[225] It seems odd, he argued, to read reasonability into only the detention of removable aliens, and not also into detention of parolees who are governed by the same section.[226] The majority essentially ruled that Congress meant to give the Attorney General discretion to hold an alien past six months only if there is a reasonable likelihood of repatriation.[227] If this standard is to be read into the statute, as the Court in fact did, it must be read into the entire statute. If it was Congress' intent to act reasonably, then courts should presume they intended to act reasonably toward all immigrants.

In applying *Zadvydas* to parolees, the court in *Borrero* quoted much of the more sweeping constitutional language of *Zadvydas*, but put even more emphasis on this idea of Congressional intent: "we can find no sound reason to interpret and apply the statute one way for one category of aliens, but a different way for others . . . there is no principled basis for not applying the majority's interpretation of § 1231 (a)(6) to Mariel Cubans."[228]

The opposing argument is that Congress simply meant to imply a reasonability level commensurate with different immigrants' constitutional status. Under this rationale, Congress meant to give the Attorney General the extent of his constitutional authority to detain an immigrant. That extent varies depending on an immigrant's status.

The other court to have considered the statutory construction angle in some detail largely followed this alternate route. Reasoning that a "seemingly universal term" can apply "differently to different persons," the court in *Chavez-Rivas v. Olsen*,[229] declined to apply *Zadvydas*' implied statutory construction of six months to parolees.[230] The court found the statute to be "capable of sustaining a reasonable interpretation that differentiates between" paroled and non-paroled immigrants.[231] The court then relied on the severability doctrine to "presume that Congress would have wanted to sever plainly constitutional from the possibly unconstitutional aspects of the statute."[232] Finally, the court found the government's rationale[233] for detaining parolees "positively perverse," but nonetheless granted the INS substantial deference and upheld the detention of parolees as

225. *See* Zadvydas v. Davis, 533 U.S. at 710-11 (Kennedy, J., dissenting) (Justice Kennedy qualifies this application to dangerous persons and flight risks).
226. *Id.* at 711.
227. *See id.* at 701.
228. Borrero v. Aljets, 178 F. Supp. 2d 1034, 1042 (D. Minn. 2001).
229. 207 F. Supp. 2d 326 (Dist. N.J. 2002).
230. *Id.* at 336.
231. *Id.* at 337.
232. *Id.*
233. The government argued that continued detention of certain aliens is necessary to deter tyrants from dumping aliens on U.S. shores. The court, however, pointed out that tyrants will care little if these aliens are jailed; and tyrants may actually be encouraged by a policy that would assure that these aliens are jailed rather than able to sneak back into their native country.

constitutional.[234]

But this argument largely rests on the supposed distinction the *Zadvydas* Court made between due process rights of resident aliens versus paroled aliens. Courts[235] have reasoned that in declining to extend *Mezei*'s lessened protections to resident aliens deemed excludable, the Supreme Court implicitly affirmed *Mezei*'s application of lessened constitutional protections to paroled aliens.[236] Courts have added to this argument by pointing to the *Zadvydas* Court's endorsement of a territorial distinction in immigration law.[237] These arguments go far in explaining the very sensible proposition put forth in *Zadvydas* that aliens seeking admission at our borders do not deserve due process rights. But courts are reading too much into *Zadvydas* when they use the opinion to uphold the legal fictions surrounding parole and deny parolees due process rights.

A reasonable reading of *Zadvydas* would include parolees within the Court's due process protection. The Court ruled that the "distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." Moreover, the Court distinguished *Mezei* by noting that the alien there was "seeking entry."[238] Parolees in the United States are not at the border "seeking entry" like Mezei, but have in fact physically entered the United States.[239] Further, the Court's sweeping language that all "'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent" deserve due process rights places the bright line at that very territorial distinction of entry into the United States. If, according to the Court, illegal immigrants deserve due process protections, then it is not the legal entry, but the physical entry that marks the due process frontier. Parolees fit squarely within this language, legal fictions notwithstanding. The *Zadvydas* Court mentioned *Mezei* only in so much as it prevented its application to aliens ordered deported.[240]

Next, both binding treaty obligations and customary international legal standards suggest a broader reading of *Zadvydas* that would extend protections against indefinite detention to parolees. Courts should interpret 8 U.S.C. § 1231(a)(6) in a way that avoids violating international law.

The indefinite imprisonment of aliens contravenes international human rights guarantees against arbitrary detention.[241] In *Ma*, the Ninth

234. Chavez-Rivas v. Olsen, 207 F. Supp. 2d 326, 338.

235. *See, e.g.*, Vera v. Estrada, No. 3-01-CV-1044-X, 2001 U.S. Dist. LEXIS 17790 (N.D. Tex. Oct. 31, 2001); Fernandez-Fajardo v. INS, 193 F. Supp. 2d 877 (M.D. La. 2001).

236. For a detailed discussion of why such a reading is unwarranted, see *supra* Section III.

237. *See* Carballo v. INS, No. 99-5698, 2001 U.S. App. LEXIS 21695 at *41 (6th Cir. Oct. 11, 2001).

238. Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

239. *Id.*

240. *Id.*

241. *See* Brief Amicus Curiae Lawyers Committee For Human Rights In Support of Respondent Kim Ho Ma, Reno v. Ma (9th Cir. 2000) (No. 00-38).

Circuit explicitly recognized "a clear international prohibition" against prolonged arbitrary detention.[242] The court noted that Article 9 of the International Covenant on Civil and Political Rights, which the United States has ratified,[243] holds that "no one[244] shall be subjected to arbitrary arrest and detention."[245] Congress can only abrogate a treaty obligation through clear legislation explicitly intended to override the treaty—something notably absent in the present case.[246] The Ninth Circuit grounded much of its opinion around the *Charming Betsy* principle of interpreting statutes so they are consistent with international law.[247] The court ultimately found that Congress did not intend to abrogate its treaty obligations by enacting 8 U.S.C. § 1231(a)(6).[248] The Ninth Circuit thus harmonized the statute with U.S. treaty obligations by reading an implicit requirement of reasonability into the statute.[249]

The Supreme Court failed to address the Ninth Circuit's international law arguments.[250] The Court found 8 U.S.C. § 1231(a)(6) to be ambiguous, but it chose to read an implicit reasonability limitation into the statute based only on constitutional considerations.[251] While the constitutional arguments surrounding the resident aliens at issue in *Zadvydas* may differ from those surrounding parolees, international law would seem to apply equally to both groups of aliens.[252] 8 U.S.C. § 1231(a)(6) is ambiguous and contains no clear intent to deviate from U.S. treaty obligations. Therefore, our treaty commitments compel courts to apply the statute vis-à-vis parolees in the same manner in which the Ninth Circuit applied it to resident aliens. The statute, then, can only allow for the reasonable detention of parolees.

Further, an evolving body of customary international law expressly proscribes arbitrary detention. The Universal Declaration of Human

242. Ma v. Reno, 208 F.3d 815, 830 (9th Cir. 2000) (citing Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998)).

243. *See* 138 Cong. Rec. S4781-84 (Apr. 2, 1992); *Ma*, 208 F.3d at 830.

244. The United States government would likely invoke the fiction of parole and argue that "no one" excludes parolees whom the government considers not actually in the United States.

245. *Ma*, 208 F.3d at 830; *see* International Covenant on Civil and Political Rights, *opened for signature*, Dec. 19, 1966, 999 U.N.T.S. 171, 21 U.N. GAOR Supp. (No. 16) at 54, *entered into force* Mar. 23, 1976, art. 9(1).

246. *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(a) ("An Act of Congress supercedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supercede the earlier rule or provision is clear and if the earlier rule or provision cannot be fairly reconciled"); United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988).

247. *See* Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804); *Ma*, 208 F.3d at 829-30.

248. *Ma*, 208 F.3d at 830.

249. *Id.* at 830-31

250. *See* Zadvydas v. Davis, 533 U.S. 678 (2001).

251. *Id.* at 688-99 (the Court's constitutional avoidance rested on this presumption).

252. *See* GORDON, MAILMAN & YALE-LOEHR, *supra* note 144, § 108.04 ("international law applies equally to resident noncitizens and to parolees").

Rights reads: "No one shall be arbitrarily arrested, detained, or exiled."[253] The American Convention on Human Rights states that "every person has the right to personal liberty and security . . . . No one shall be subject to arbitrary arrest or imprisonment."[254] The Restatement (Third) of Foreign Relations Law argues that a state violates international law if is "practices, encourages, or condones . . . prolonged arbitrary detention."[255] The UN Working Group on Arbitrary Detention has reasoned that detention becomes "arbitrary" when a detainee is "kept in detention after the completion of his sentence."[256] The European Court of Human Rights has ruled states can only detain aliens pending extradition for a reasonable time.[257] In a case quite similar to *Zadvydas*, the European Court of Human Rights court ruled that an eighteen-month incarceration violates the European Convention's prohibition against arbitrary detention.[258] And, the United Nations High Commissioner for Refugees has expressed concerns about the practical effects of the indefinite detention on asylum seekers and refugees.[259]

If this body of international law has evolved to a generally accepted norm of customary international law, then U.S. courts must treat it as federal common law.[260] The Attorney General's decision to incarcerate aliens under 8 U.S.C. § 1231(a)(6) arguably serves as a controlling executive act

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253. Universal Declaration of Human Rights, Dec. 10, 1948, art. 9, U.N.G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

254. American Convention on Human Rights, July 18, 1978, art. 7, 1144 U.N.T.S. 123.

255. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702.

256. *Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4./1998/44 (1997).

257. *See* Quinn v. France, 21 Eur. Ct. H.R. 21, 529 (1996).

258. As the European Court of Human Rights explained:

> [i]t is clear from the wording of both the French and English versions of Article 5(1)(f) of the European Convention for the Protection of Human Rights and Fundamental Freedoms that deprivation of liberty under this subparagraph will be justified only for as long as extradition proceedings are being conducted. It follows that if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under Article 5(1)(f).

Id. at 550.

259. *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Refugees*, UN High Commissioner for Refugees (Feb. 10, 1999). As the High Commissioner has stated:

> [t]he inability of stateless persons who have left their country of habitual residence to return to their countries has been a reason for unduly prolonged or arbitrary detention of these persons in third countries. Similarly, individuals whom the State of nationality refuses to accept back on the basis that nationality was withdrawn or lost while they were out of the country, or who are not acknowledged as nationals without proof of nationality, which in the circumstances is difficult to acquire, have also been held in prolonged or indefinite detention only because the question of where to send them remains unsolved.

Id.

260. *See* Paquete Habana, 175 U.S. 677, 677 (1900) (stating "international law is part of our law, and must be ascertained and administered by the courts. . ."); *see also* Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) (finding it a "settled proposition that federal common law incorporates international law").

that could override this common law.[261] Nonetheless, courts should use this body of international law to better understand our treaty obligations, and better interpret congressional intent in enacting the statute. If Congress intended to give the Attorney General the power to act in a way so contradictory to international law, one would have expected Congress to have done so more explicitly.

Finally, even if courts ultimately fail to apply the *Zadvydas* decision to parolees, the opinion will surely put great strain on the very concept of parole. If the statute is not applied equally to resident aliens and parolees an albeit odd legal fiction created to deal with administrative irregularities could mean the difference between six months and a lifetime of incarceration. This huge difference in treatment would largely hinge on the label the government chooses to attach to an incoming alien.

Conclusion: The Half Left to be Done

The *Zadvydas* opinion reasserted judicial review, lessened the plenary deference accorded the other branches on immigration matters, and upheld important due process protections for some aliens. But the opinion made few decisive constitutional decisions, and left important questions unanswered. Since *Zadvydas* the legislative and popular landscape surrounding immigration law generally, and detentions in particular, has changed dramatically. The Court will undoubtedly soon confront constitutional challenges to the indefinite detention of parolees, to administrative retooling of indefinite detention generally, and to the immigration provisions of the USA PATRIOT Act.[262] The Court should approach these situations with the same scrutinizing and skeptical attitude it displayed in *Zadvydas*. The next time, though, the escape hatch of constitutional avoidance will likely not be available. Decisive and complete decisions will have to be made.

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261. *See* Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986) (finding the Attorney General's decision to indefinitely confine aliens to be a controlling executive act that overrides any customary international law to the contrary).

262. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No 107-56, 115 Stat. 272 (2001).